COPY

Supreme Court U. S.
FILED
NOV 11 1945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 675

VERNA MAE BIHN, *Petitioner*

—*v.*—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

DAVID V. CAHILL,
HENRY K. CHAPMAN,
Attorneys for Petitioner.

RECORD PRESS—NYC—REctor 2-2638

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	4
Specification of Errors To Be Urged	8
Argument	9
POINT I	
By the said instructions the Court shifted the burden of proof, requiring the petitioner to exculpate herself.	9
POINT II	
Counsel for appellant took a proper, specific and adequate exception to the District Court's instruction, in the very words thereof and was not required to pursue the Court for an elucidation thereof.	14
POINT III	
The erroneous instruction was serious, prejudicial and not mere harmless error.	18
CONCLUSION	20

Cases Cited

	PAGE
Agnew v. United States, 165 U. S. 36, 52	14
Bollenbach v. United States, 66 S. Ct. 402	14, 19, 20
Boatright v. United States (C. C. A. 8), 105 F. (2d) 737, 740	13, 14
Bruno v. United States, 308 U. S. 287, 293-294	18
Diehl v. United States (C. C. A. 8), 98 F. (2d) 545, 547	13
Drossos v. United States (C. C. A. 8), 2 F. (2d) 538	13
Hall v. Aetna Life Ins. Co. (C. C. A. 8), 85 F. (2d) 447, 450	15
Hewitt v. United States (C. C. A. 8), 110 F. (2d) 119	15
Little v. United States (C. C. A. 10), 73 F. (2d) 861, 866	14
McCandless v. United States, 298 U. S. 342, 347	18
Miller v. United States (C. C. A. 10), 120 F. (2d) 968, 972	18
Muench v. United States (C. C. A. 8), 92 F. (2d) 332, 336	15
Silkworth v. United States (C. C. A. 2), 10 F. (2d) 711, 721	15
United States v. Bennett, et al. 152 F. (2d) 342-349	1
Ward v. United States (C. C. A. 5), 96 F. (2d) 189, 192	13
Weiler v. United States, 323 U. S. 606, 611	18

Other Authorities Cited

	PAGE
Section 240(a) of Judicial Code amended by Act of February 13, 1925	1
Rules XI and XIII of Criminal Appeals Rules of May 7, 1934	2
Title 18, Section 88 United States Code	2
Title 50, Section 633 (Appendix) United States Code	2, 4
Section 37 of Criminal Code (18 U. S. C. 88)	3
Section 2 (a) of Act of June 28, 1940 (54 Stat. 676) Amended by Act of May 31, 1941 (55 Stat. 236)	3
Title III of Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633	3
General Ration Order No. 8, as amended (8 F. R. 9626, 9 F. R. 1325, 2746)	4
Rules of the Circuit Court of Appeals for the Second Circuit, 9, 10	15
Rule 51 of New Rules of Criminal Procedure	17
Rule 52 of Rules of Criminal Procedure, subdivision (b)	17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 675

VERNA MAE BIHN, *Petitioner*

—*v.*—

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

No opinion was rendered by the District Court.

The majority and dissenting opinions in the circuit court of appeals (R. 25-37) are reported in 152 F. (2d) 342-349, sub nom. *United States* v. *Bennett, et al.*

Jurisdiction

The judgment of the circuit court of appeals was entered November 15, 1945 (R. 38, f. 51). The petition for a writ of certiorari was filed December 17, 1945. Certiorari was granted by order of this Court on February 11, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of

February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

Questions Presented

1. In this case, under an indictment charging conspiracy (Title 18, Section 88) to violate Title 50, Appendix, Section 633, United States Code, was it not prejudicial error on the part of the District Court to instruct the jury in the manner it did, at R. 15, f. 18 of the record, to wit:

> "Her claim is that other people had access to these stamps. I don't know, perhaps she tries to suggest by inference that somebody else in the bank took them. But it was her responsibility to take charge of the stamps and count them and prepare this paper and see to it that this paper was accurate, and she submitted it to the cashier for signature and this shows the number of gallons which as I said had been testified to as being short 37,000 odd gallons.
>
> Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. Did she steal them? Who did if she didn't? You are to decide that."

2. Did not the charge of the District Court at R. 15, f. 19 of the record nullify the presumption of innocence and "shift the burden of proof" to the petitioner requiring her to exculpate herself?

Statutes Involved

Section 37 of the Criminal Code (18 U. S. C. 88) provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or hereafter issued, shall be guilty of a

misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

The pertinent provisions of General Ration Order No. 8, as amended (8 F. R. 9626, 9 F. R. 1325, 2746), issued by the Office of Price Administration, are as follows:

> SECTION 2.6. *Acquisition, use, transfer or possession of ration document.*—No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

Statement

The object of the conspiracy alleged was to unlawfully acquire, possess and transfer gasoline ration coupons contrary to Section 633(2)a(5) of Title 50, Appendix, United States Code, and in violation of Ration Order #5c and General Ration Order #8.

The appellant below and petitioner here, was employed in a bank in Poughkeepsie, New York. During the greater portion of the period of her employment of about a year she was in charge of ration currency bookkeeping which the bank undertook on behalf of the Government. During said time she was acquainted with one, George Wesley Bennett, who for a time boarded at the apartment in which she and her husband resided (R. 6).

It is further alleged that during this time she would steal ration coupons from the deposits made at the bank and give them to Bennett to sell and they would divide the proceeds.

Bennett was married in February, 1944 and moved from the Bihn home and went to live with his mother-in-law, Susanna Howe. His sister-in-law, Hanna Howe, was also a member of the household.* During an argument and altercation in May, 1944, outside of their home, the mother-in-law, Susanna Howe, it is claimed, told the appellant "if she didn't leave us alone, I would be forced to notify the F. B. I., that I thought they would be very interested in the gasoline coupons and others she was stealing from the bank." Appellant is alleged to have replied: "Go ahead. Your son-in-law is in it just as deep as I am and if I go to prison he will go too" (S. M. 6, 63).*

The Howes testified and Mrs. Bennett, who also testified, stated they had seen large quantities of these coupons in Bennett's possession and that he had upon inquiry from them, admitted receiving them from appellant (S. M. 58).

The testimony was that Bennett also told other Government witnesses that he was getting the coupons from a girl working in the bank (S. M. 36) with whom he was fooling around; and that this girl was the appellant was testified to by one of these witnesses (S. M. 33).

Shortly after the aforementioned quarrel and altercation, appellant wrote a letter to Bennett and sent a carbon copy to Mrs. Howe. In this letter she referred to the quarrel and said among other things not pertinent or relevant, "I didn't miss the crack about the F. B. I. Look to me like you are trying to break into prison with you

* The original stenographic copy of the minutes of the trial has been filed with the clerk, and references thereto are indicated by S. M.

bare hands. Don't worry I can take it. I haven't much more than that now. But I think confining you will hurt you worse than it will me" (Exh. 1, S. M. 31).

Appellant explained these statements, oral and written, by testifying that Bennett's wife, mother-in-law and sister-in-law were jealous of her because of her relations with Bennett prior to his marriage. She denied she had stolen any coupons. She gave a different version of her remarks and testified that when accused by them of having written certain letters to Bennett, she denied having done so and that the mother-in-law then rejoined "I think the F. B. I. would be interested to know about you", but didn't make any mention of gasoline coupons. The appellant further admitted having written in her letter to Bennett "I didn't miss that crack about the F. B. I. It looks to me like you are trying to break into prison with your bare hands, etc." As to this, appellant testified that Bennett had shown her a postal card which he stated his wife had received and asked her whether she had written it. She in turn asked him if he had written it since he had told her once of having written a postal card to another girl in order to get rid of her and it looked to her like he was pursuing the same method (S. M. 135-138, 145-147).

With reference to the remark "it will hurt you worse than me", appellant stated that the sister-in-law and mother-in-law had threatened to go to the F. B. I. relative to letters and postal cards received by them (S. M. 146).

The coupons were not received at the bank by appellant when deposited by the bank's clients but it was her duty to check these deposits after receipt from the bank tellers and notify the depositors of any errors. Frequently the deposit slips indicated greater deposits than were actually made (S. M. 125, 126).

Appellant made daily entries in the bank's books of the deposits of ration evidence. The ration coupons were kept in a steel letter file to which admittedly at least four other named persons had equal access and occasion to use for the same purpose, *i.e.*, to deposit and take ration evidence when required by the bank's operations. Later, appellant would make up a recapitulation sheet of the ration evidence deposited, without however, again counting the actual coupons and tokens but solely from the figures on the daily sheets (S. M. 125, 127).

Every two weeks, appellant would take from the steel letter file the accumulated ration coupons and tokens and place them in a cardboard box. At first these would be destroyed at the city incinerator. Later, they were forwarded to the Office of Price Administration in New York City. When doing this she would make up a form supplied by the Office of Price Administration showing the contents of the box. In arriving at the figures on the form, she would not make an actual count of the coupons and tokens but would take these figures from the daily deposit and recapitulation sheets (S. M. 81).

During these two week intervals at least the four other named who were employed by the bank had free access to the contents of the steel letter file containing the ration evidence (S. M. 99).

On or about September 6, 1944, appellant prepared an O. P. A. form as above described and a box for shipment to the Office of Price Administration presumably containing the amounts of coupons of various kinds as indicated therein. She presented both to the bank cashier for his signature as was customary. Instead of signing the form he retained it and the box and caused the contents to be checked against the figures on the form. This disclosed

a shortage of coupons of the value of 37,023½ gallons, the box containing ration evidence of 119,772 gallons whereas the form had on it the figure 156,795½ gallons (S. M. 81, 84, 85).

All the other ration evidence, shoes, meat, processed foods, etc., tallied exactly (S. M. 116, 117).

The foregoing resume is being furnished merely to apprise the Court of some of the facts alleged in the indictment and proof offered by the Government and not because any error is claimed in the admission, receipt or exclusion of evidence during the trial.

The appeal in the Court below was grounded solely upon error in the charge as to the law by the District Court and more particularly upon the questions presented above.

Specification of Errors To Be Urged

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court and holding that the instructions of the Court, to which due exception was taken, were not prejudicial and did not serve to require the petitioner to exculpate herself.

2. In holding that the instructions of the District Court did not nullify the presumption of innocence and "shift the burden of proof" to the petitioner.

3. In holding that the petitioner's attorney did not take proper and adequate steps to point out the error in the said erroneous instructions of the Court on the law and impliedly holding that the exception taken to the said instructions was not sufficient to raise a question on appeal.

4. In holding tacitly and by implication that in view of the evidence connecting the petitioner with the conspiracy, any error in the charge of the District Court was not prejudicial but mere "harmless error". (28 U. S. C. Sec. 391)

ARGUMENT

POINT I

By the said instructions the Court shifted the burden of proof, requiring the petitioner to exculpate herself.

The petitioner took the witness stand in her own behalf. She testified at length to the manner of the banking of ration evidence. She said that the ration coupons were kept in a steel letter file which had a lock; and that the keys to this file were kept in appellant's desk which had no lock. Mr. Travis, the bank cashier, who testified for the Government had a key to the steel file. Three other persons, the note teller, the assistant note teller and a stenographer, had access to and occasion to go to the steel letter file; they would not ask appellant for the key, but would go to her desk and help themselves. Other bank employees may have gone to the steel file and taken ration tokens said Mr. Travis and the appellant testified that if she were not available to furnish either ration information or tokens, another employee of the bank would see to the clients' wants. Mr. Travis testified that appellant's records were accurately kept by her (R. 8).

Under these circumstances with a number of persons having access to the file in which the ration coupons were kept, there was a fair argument and ground for reasonable doubt as to appellant's guilt, which should have been

submitted impartially by the Court to the jury. But the Court, instead, nullified the favorable fact situation and precluded its consideration, by placing the appellant on one side, all other persons on the other side and then asked the rhetorical question, "Who did if she didn't?"

At the close of the testimony on both sides, the jury, beyond listening to the charge of the Court had but one duty to perform, *i.e.*, to determine whether the evidence adduced at the trial was adequate to convince it beyond a reasonable doubt that the petitioner was guilty of the conspiracy charged by the indictment. No other duty devolved on it, save to acquit the petitioner, if it were not so satisfied. The jury was not under a duty to decide who stole the ration coupons if petitioner didn't. Yet they were charged to do so *in haec verba.*

The instruction placed on the jury the duty of finding who the guilty person was assuming that someone was guilty. The proper instruction would have confined them to the only question presented, whether petitioner committed the crime charged. The dissenting opinion (FRANK, *C. J.*), strongly emphasizes this lapse on the part of the trial judge.

After referring to the transcript of the minutes of the trial, FRANK, *C. J.*, said:

> "(c) The transcript also shows the following: As, from time to time, the coupons were deposited in the box, appellant made entries of the deposits. Subsequently, without again examining the contents of the box, appellant, from her previous entries, compiled the written statement which, it turned out, gravely overstated the amount of gasoline represented by the coupons in the box. But, in the interval between the time when she made her first entries and the time

when she prepared the inaccurate statement, not less than four persons other than appellant had had access to the box; among them was Miss Shannon with whom (so appellant testified) Bennett had a far more than casual acquaintance.

2. Thus, disregarding (as we should) that part of the stipulation based upon Bennett's statements, there is no direct evidence of theft by appellant except the testimony of Bennett's wife, mother-in-law and sister-in-law, which might easily have been biased. The only other evidence of her guilt consists of an inference which could reasonably—but need not—be drawn from the gross inaccuracy of the written statement made by appellant of the contents of the box. Accordingly the verdict may well have turned on whether such an inference was made by the jury.

In these circumstances—and remembering that the indictment charged, as an essential part of the conspiracy, that appellant had stolen the coupons—it was of course entirely legitimate for appellant to argue thus to the jury: Since any one of four other persons might have stolen the coupons, there could easily be a reasonable doubt as to appellant's guilt. That issue was obviously crucial.

It was in this context that the judge, in the middle of his instructions, told the jury: "Who would have a motive to steal them? Did she take these stamps? You have a right to consider that. She is not charged with stealing, but with conspiracy to do all these things, and you have a right to consider whether she did steal them, on the question of intent. *Did she steal them? Who did it if she didn't? You are to decide that.*"

Considering what I have called the 'crucial issue,' it is highly likely that the jurors did not take this remark lightly. They had before them uncontradicted evidence by which, as they knew, appellant was trying to persuade them that, since the coupons might have come into Bennett's possession via any one of four other persons, there was a reasonable doubt as to appellant's guilt. Literally interpreted, the judge's charge told them that this was not sufficient to justify acquittal, for it was their 'duty' (a) to decide that appellant committed the theft unless (b) they decided that some other specific person did. So interpreted, this charge erred by putting on appellant the burden of proving her innocence by proving the identity of some other person as the thief. See, *e.g.*, *Boatright* v. *United States*, 105 F. (2d) 737, 740 (C. C. A. 8); *Ward* v. *United States*, 96 F. (2d) 189, 192 (C. C. A. 5); cf. *United States* v. *Wishnatzki*, 77 F. (2d) 357, 360 (C. C. A. 2). The charge would perhaps not have been so interpreted by one with a well trained legal mind; but the Supreme Court has admonished us that the minds of jurors, not being so trained, are usually incapable of subtle discriminations. *Shepard* v. *United States*, 290 U. S. 96, 104. As we have no basis for assuming that the jurors did not accept this charge at its face value, I think we should conclude that it was prejudicially erroneous.

True, the judge also gave the usual general instructions about the burden of proof and presumption of innocence. But, in the face of this specific instruction, the best that can be said is that the jurors may easily have been confused. It has often been held that a verdict should be reversed where, when general instructions are inconsistent with a specific instruc-

tion, the jury may have been confused. See, *e.g.*, *Drossos* v. *United States*, 2 F. (2d) 538, 539 (C. C. A. 8); *Cummings* v. *Pennsylvania R. Co.*, 45 F. (2d) 152 (C. C. A. 2); *Schroble* v. *Lehigh Valley R. Co.*, 62 F. (2d) 993, 996 (C. C. A. 2); cf. *Shepard* v. *United States*, *supra*."

While the Court charged generally on the essential instructions required in criminal cases, it went far beyond what was required and in the particular instructions found at R. 15, fell into serious error, prejudicing the appellant and "shifting the burden of proof" to her.

Bearing in mind, the testimony of the appellant adverted to above, which was stamped as true by the testimony of the witness, Travis, testifying for the Government, the instructions so given had the effect of telling the members of the jury that if by her testimony the appellant had not convinced them that someone else had stolen the ration coupons, then the appellant must have done so. It had the effect of requiring the appellant to convince the members of the jury that she was not, instead of requiring the Government to convince them that she was guilty of the charge in the indictment.

Ward v. *United States* (C. C. A. 5), 96 F. (2d) 189, 192;

Boatright v. *United States* (C. C. A. 8), 105 F. (2d) 737, 740;

Drossos v. *United States* (C. C. A. 8), 2 F. (2d) 538.

The Court by its charge disparaged the claim of appellant that the theft of the ration coupons might well have been committed by the others who admittedly had equal

access to them in the letter file, emphasized her responsibility in the matter and became an advocate for the Government on this very important issue by indicating that the appellant would be motivated to steal them while at the same time, by inference, deprecating the possibility of a like motive on the part of the other bank employees.

Boatright v. *United States*, *supra*.

If there was any confusion engendered in the minds of the jury, it was created by the Court in giving the instruction complained of to which proper, adequate and specific exception was taken.

A charge should not be misleading. (See *Agnew* v. *United States*, 165 U. S. 36, 52, cited in *Bollenbach* v. *United States*, 66 S. Ct. 402.)

It is submitted that in order to establish substantial error it is not required of appellant that she definitely point out with exactitude the prejudice in the Court's instructions.

Little v. *United States* (C. C. A. 10), 73 F. (2d) 861, 866.

POINT II

Counsel for appellant took a proper, specific and adequate exception to the District Court's instruction, in the very words thereof and was not required to pursue the Court for an elucidation thereof.

The majority of the Circuit Court of Appeals took the attitude, unreasonably, it is respectfully submitted, that petitioner's attorney should have persisted in his exception to the Court's erroneous instruction on the law and

insisted that it be corrected. But counsel did except thereto in unmistakable language, in fact, in the very words employed by the Court when giving the instructions. When the Court failed to pay heed to this exception so clearly put [redacted] instead went on to reiterate that the charge in the indictment was that of conspiracy and not of a substantive crime, he again forcibly called the Court's attention to its error when he stated that that was not the point of his exception.

Should he have persisted in requesting the Court to further clarify its instruction? While the majority of the Court below believed that was required of him, the authorities are to the contrary. All that is required is that the exception to the instruction be specific and not merely general, that it direct the attention of the Court to the alleged mistake and thus enable it to correct its error, if any there be.

Hewitt v. *United States* (C. C. A. 8), 110 F. (2d) 119;

Silkworth v. *United States* (C. C. A. 2), 10 F. (2d) 711, 721;

Muench v. *United States* (C. C. A. 8), 92 F. (2d) 332, 336;

Diehl v. *United States* (C. C. A. 8), 98 F. (2d) 545, 547;

Hall v. *Aetna Life Ins. Co.* (C. C. A. 8), 85 F. (2d) 447, 450;

Rules of the Circuit Court of Appeals for the Second Circuit, 9, 10.

To have persisted and reiterated an objection already clearly stated would probably have produced no result except to draw the fire of the Court and to prejudice the

petitioner before the jury. An experienced trial judge like the one presiding could not have failed to understand the point and that is all that can reasonably be required for consideration of the error and resulting prejudice.

As succinctly pointed out by FRANK, C. J., in his dissenting opinion (R. 35, 36), there was absolutely no necessity or requirement on the part of petitioner's attorney to pursue the District Court on this point and insist on an elucidation of the erroneous instruction. He then said:

"When the judge had concluded his instructions, appellant's lawyer excepted as follows: 'I take exception to your Honor's charge to the jury that it is the jury's duty to find out who did steal the stamps. 'Did she? Who did if she did not? You are to decide that.' I except to that because it is not part of the jury's duty."

That was a clear enough statement of the nature of the judge's error; surely clear enough for one whom my colleagues characterize as an "experienced trial judge." It advised him that it was erroneous to tell the jury that, as part of its duty, in order to acquit, it must decide what person stole the coupons if appellant did not. The judge, thus warned, did nothing to correct the error, saying merely, "Yes, I say that was not the crime, but the question is whether these defendants entered into a conspiracy to steal, possess, and transfer these stamps." If that meant anything it meant that appellant was not charged with the substantive crime of theft but with theft as part of a conspiracy, a question not raised by the exception. This comment did not correct the erroneous instruction that unless, from the evidence, the jury found that some other identified person stole the coupons, it must conclude that appellant did.

After the trial judge thus commented, appellant's lawyer said, "That is not the point of my exception." My colleagues suggest that that rejoinder was insufficient, that the lawyer should have made his exception more explicit. I do not agree because, as stated above, I think that the reasons originally given for the exception were adequately clear.

In the light of Rule 51 of the new Rules of Criminal Procedure (assuming this rule also applies to exceptions to instructions of the court on the law) the position of the majority of the Court below is, it is most respectfully submitted, not well taken. Said rule reads as follows:

> RULE 51. EXCEPTIONS UNNECESSARY. Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

And see also subdivision (b) of Rule 52, reading as follows:

> (b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

POINT III

The erroneous instruction was serious, prejudicial and not mere harmless error.

Although the appeal in the Court below brought up for review only the charge of the Court and only this was printed in the record, the appellate court saw fit to read the transcript of the minutes of the trial. It would seem that after reading this transcript the majority of the Court came to the conclusion that the appellant was undoubtedly guilty of the conspiracy charged by the indictment and *a fortiori*, any error in the Court's instructions to the jury which rendered a verdict of guilty was harmless.

The guilt or innocence of the appellant was not to be passed upon by the Court below on this appeal. That issue was not raised there. What was to be determined was whether the jury had been sufficiently and properly instructed on the law.

As was said in *Miller* v. *United States* (C. C. A. 10), 120 F. (2d) 968, 972:

> "It is not sufficient that an instruction be so drawn that a jury may reach the right conclusion, but it is required that it be so framed that a jury may not draw the wrong conclusion therefrom."

The dissenting opinion in the Court below discloses that the Circuit Court of Appeals for the Second Circuit when it passed on the instant case has adopted a view of the "harmless error" doctrine which is contrary to that expressed in opinions of all the other Circuits and at variance with the pronouncements of the Supreme Court of the United States in *McCandless* v. *United States*, 298 U. S. 342, 347; *Brown* v. *United States*, 308 U. S. 287, 293-294 and *Weiler* v. *United States*, 323 U. S. 606, 611.

Only very recently, this Court had the occasion in *Bollenbach* v. *United States* (66 S. Ct. 402) to pass on this very important point and there said:

"The government argues that the sting of error is extracted because there was proof, other than the erroneous "presumption", on the issue of Bollenbach's participation in the wrongdoing before the transportation of the stolen securities had ended. This is to disregard the vital fact that for seven hours the jury was unable to find guilt in the light of the main charge, but reached a verdict of guilty under the conspiracy count five minutes after their inquiry was answered by an untenable legal proposition. It would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous "presumption" given them as a guide. A charge should not be misleading (see *Lanier* v. *United States*, 165 U. S. 36, 52). Legal presumptions involve subtle conceptions to which not even judges always bring clear understanding (see Thayer, *Preliminary Treatise on Evidence*, 1898, chaps. 8 and 9; Wigmore, *Evidence*, 3rd ed. 1940, secs. 2490-2540; Morgan, *Some Observations Concerning Presumptions*, 1931, 44 Harv. L. Rev., 906; Denning, *Presumptions and Burdens*, 1945, 61 L. Q. Rev. 379). In view of the government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standard appropriate for criminal trials in the federal courts.

Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those

"technical errors" which "do not affect the substantial rights of the parties" and must therefore be disregarded (40 Stat., 1181, 28 U. S. C., sec. 391). All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The "technical errors" against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency (see Taft, *Administration of Criminal Law*, 1905, 15 Yale L. J., 1, 15). Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless (*Bruno* v. *United States*, 308 U. S. 287, 293-94; *Weiler* v. *United States*, 323 U. S. 606, 611). From presuming too often all errors to be "prejudicial", the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.

No otherwise correct abstract charge cannot cure an erroneous instruction of so concrete, vital, determinative and [illegible] nature as in the instant case.

[illegible] from *Bollenbach* v. *United States*, *supra*, this Court, in discussing this point, said:

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law (*Quercia* v. *United States*, 289 U. S. 466, 469). 'The influence of the trial judge on the jury is necessarily and properly of great weight' (*Starr* v. *United States*, 153 U. S. 614, 626), and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating charge."

CONCLUSION

The judgment of conviction should be reversed and a new trial ordered.

Respectfully submitted,

DAVID V. CAHILL,
HENRY K. CHAPMAN,
Attorneys for Petitioner.